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## **International criminal tribunals and reconciliation: Reflections on the role of remorse and apology**

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# International Criminal Tribunals and Reconciliation

## Reflections on the Role of Remorse and Apology

Oliver Diggelmann\*

### Abstract

*Literature on transitional justice routinely assumes positive effects of international criminal proceedings on reconciliation processes. Expressions of remorse and apology before international criminal tribunals are attributed a key role in the scenario. This view is influenced by the role of remorse and apology in human dispute resolution in general and, particularly, in domestic criminal proceedings. That Western societies have become friendlier towards remorse and apology in the last decades — in the age of the ‘new culture of apology’ — might also play a certain role. This article argues, however, that there is a substantive gap between the assumed and the actual role of apology and remorse in international criminal proceedings. Analysis of the practice of international criminal tribunals reveals that cases of sincere remorse or apologies among high ranks — that would be of particular value for reconciliation processes — are hardly existent, and fakery of remorse is fostered by judicial practice. Additionally, positive effects of remorse and apology in the context of macro crimes tend to be overestimated. The article attributes the gap between the assumed and the actual role partly to the wish to avoid facing the void.*

### 1. Introduction

When the United Nations (UN) Security Council created the ad hoc tribunals for the former Yugoslavia and Rwanda, it acted on the basis of an assumption that they would contribute to reconciliation in and between the concerned societies. The resolution establishing the International Criminal Tribunal for Rwanda (ICTR) was explicit in this respect. According to its preamble, the tribunal was meant to contribute, inter alia, to ‘national reconciliation’.<sup>1</sup>

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1 SC Res. 955 (1994), Preamble.

The ICTR should promote moral catharsis and thereby pave the ground for the reconstruction of the society. The resolution establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), which was adopted one and a half years earlier, had been less clear. It only spoke of 'restoration and maintenance of peace' and did not mention the term 'reconciliation'.<sup>2</sup> But, in a resolution adopted in 1996, the UN General Assembly noted 'the importance and urgency' of the tribunal's work as an 'element of the process of reconciliation in Bosnia and Herzegovina and in the region'.<sup>3</sup> The interplay of trials and media coverage, of statements by perpetrators, victims and members of the civil society was expected to have a substantive healing effect. Remorse and apology, which are not explicitly mentioned in any of the cited documents, are implicitly attributed a key role in the scenario. Without them — without a certain reconnection between perpetrators and victims — forgiveness and sustainable reconciliation are hardly conceivable.<sup>4</sup> Theoretical literature on transitional justice arrangements, therefore, routinely assumes a substantive role of remorse and apology in international criminal proceedings when it makes links between trials and reconciliation.<sup>5</sup> Many authors even tend to believe that '[a] complete and sincere apology by itself is capable of effecting reconciliation'.<sup>6</sup>

Two names are mainly associated with the topic of remorse/apology and international criminal tribunals. Biljana Plavšić, member of the collective presidencies of both Bosnia and the breakaway Serbian Republic of Bosnia, made a spectacular statement during her trial. It was praised as a paradigmatic case of remorse and will be discussed later. Albert Speer, minister of Armaments and War Production of Nazi Germany and Hitler's main architect, who was indicted at the International Military Tribunal in Nuremberg, is known for distancing himself from Hitler and the Nazi regime during the trial and for accepting some responsibility. He was the only one to do so among the main defendants at Nuremberg. A further name often associated with the topic is Dražen Erdemović. His case is known as a particularly 'tragic' one, because he found himself in a situation where he had to choose between shooting innocent civilians or being shot himself.<sup>7</sup> In this article, my focus will mainly lie on high-ranking perpetrators, though, as remorse and apology

2 SC Res. 827 (1993), Preamble.

3 GA Res. 51/203, 17 December 1996.

4 Laurel E. Fletcher and Harvey M. Weinstein point out that the vocabulary of 'remorse' and 'reconciliation', which is borrowed from medical and theological models, artificially constricts the frame of reference to examine phenomena that are still poorly understood: L.E. Fletcher and H.M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', 24 *Human Rights Quarterly* (2002) 573–639, at 600.

5 Michael Ignatieff early on critically examined the idea of a necessary link between trials and reconciliation, in *The Warrior's Honor: Ethnic War and the Modern Conscience* (Henry Holt and Company, 1997), at 184–190.

6 H.K. Josephs, 'The Remedy of Apology in Comparative and International Law: Self-healing and Reconciliation', 18 *Emory International Law Review* (2004) 53–84, at 60.

7 On Erdemović's dilemma: I.R. Wall, 'Duress, International Criminal Law and Literature', 4 *Journal of International Criminal Justice (JICJ)* (2002) 724–744, at 725–728.

from their side are expected to be of particular importance for reconciliation processes. For the mentioned cases of Speer and Plavšić, I will address the question whether they are deservedly associated with the topic of remorse and apology.

The principal aim of this article is to reflect on the role of remorse and apology in international criminal proceedings in general. I will engage in the question where the optimism with respect to their reconciliatory power in international criminal proceedings stems from and whether they actually play the role they are expected and assumed to. I will, eventually, argue that this is less the case than in the domestic sphere. Three reasons will be identified. First, international criminal tribunals often treat faked remorse as sincere. Secondly, the likelihood of remorse and apology among high ranks — where it would matter most for reconciliation processes — is low. Thirdly, the positive effects even of sincere remorse and corresponding apologies after macro crimes tend to be overestimated. The text inserts itself into critical reflections about law and apology that have been under way for some years in domestic legal systems, but have barely begun in the discipline of international law.<sup>8</sup> After these introductory remarks (Section 1), I will first trace the origins of remorse as a mitigating factor in international criminal proceedings and consider two arguments supporting an optimistic view (Section 2). Then, I will turn to more critical reflections that challenge the optimism (Section 3). Finally, I will suggest that our counterfactual hope in remorse and apology is rooted in a spiritual need to make sense of our conceptions of humans and humankind (Section 4).

## 2. Import of Domestic Practices

### A. *Granting a 'Right to a Discount'*

The topic needs to be addressed within a wide frame. The relatively short history of international criminal justice and its limited settledness must briefly be recalled. If we regard the Nuremberg and Tokyo Tribunals as the forerunners, the 'modern' history spans roughly over a quarter of a century. As impressive as progress was after the end of the cold war, international criminal proceedings in the aftermath of atrocities are still a relatively novel undertaking. Expectations were high and experience was little in the 1990s when international criminal justice was (re-)established. The architects and early practitioners, most of whom were Westerners or Western-trained, mainly availed themselves of domestic criminal law of liberal states. As a consequence, structures, rules and methodologies heavily borrow from 'ordinary' criminal procedural law and systems of punishment of dominant

8 C. Jenkins, 'Taking Apology Seriously', in M. du Plessis and S. Peté (eds), *Repairing the Past: International Perspectives on Reparations for Gross Human Rights Violations* (Intersentia, 2007) 53–81, at 65.

Western states.<sup>9</sup> This 'import' also concerned rules and practices with respect to aggravating and mitigating factors. As regards the mitigating factor 'remorse', which I am particularly interested in, the 'transfer' was made without paying attention to possibly significant particularities of remorse/apology in the context of macro crimes.<sup>10</sup> The question whether they can or should in principle be treated the same way they are in the domestic sphere was not posed. The relevant statutes in fact do not mention remorse.<sup>11</sup> Nevertheless, it found its way into international criminal proceedings through judiciary practice. Judges used the statutorial leeway to turn to the familiar and engaged in comparative analysis of domestic criminal systems of dominant states. Thereby they imported the tenet of remorse as a mitigating factor into the international criminal system.<sup>12</sup>

Against this background, it becomes a key fact for our topic that in Western countries, remorse and apology are routinely taken into account in sentencing. They are an essential part of everyday criminal law. Some randomly gathered evidence may illustrate this. In the United Kingdom, for example, remorse is always among the most frequently cited mitigating factors in criminal trials.<sup>13</sup> In offences causing death, it is cited in no less than 39 per cent of the sentences imposed,<sup>14</sup> and in cases of domestic burglary, it is taken into account in 21 per cent of the cases.<sup>15</sup> Remorse can make a substantial difference. In Australia, it routinely leads to a substantial reduction of the normal sentence<sup>16</sup> and US federal courts regularly reduce sentences by two or three 'levels' for defendants who express contrition or remorse.<sup>17</sup> It does not matter whether grave crimes or minor ones are concerned, remorse is automatically treated

9 M.A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007), at 23.

10 This omission of appropriate attention to macro crime specific challenges is also criticized with respect to other aspects of international criminal law (see i.e. Drumbl, *ibid.*, at 35–41).

11 Art. 24(2) ICTYSt., Art. 23(2) ICTRSt. and Art. 78(1) ICCSt. provide that the 'circumstances of the convicted person' should be taken into account.

12 A. Tieger, 'Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia', 16 *Leiden Journal of International Law* (2004) 777–786, at 784; see also the case that introduced remorse as a mitigating factor into the practice of contemporary international criminal tribunals: ICTY, Prosecutor's Brief on Aggravating and Mitigating Factors, *Erdemović* (IT-96-22-T), 11 November 1996, at 6.

13 H. Maslen, 'Penitence or Persistence: How Should Sentencing Factors Interact?', in J.V. Roberts (ed.), *Exploring Sentencing Practice in England and Wales* (Palgrave Macmillan, 2015) 173–193, at 176.

14 *Ibid.*

15 Sentencing Council, 'Crown Court Sentencing Survey', Annual Publication 2014, 25 June 2015, available online at [www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/CCSS-Annual-2014.pdf) (visited 1 June 2016), at 29.

16 See R. Edney and M. Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007), at 175.

17 St. Bibas and R.A. Bierschbach, 'Integrating Remorse and Apology into Criminal Procedure', 114 *The Yale Law Journal* (Yale LJ) (2004) 85–148, at 93 with further references.

as relevant. Justice Anthony Kennedy said that expressions of remorse can make the difference between life and death.<sup>18</sup> Furthermore, remorse is also an important factor when the perspectives of a defendant are assessed. Data from the United Kingdom suggests that the likelihood of a perpetrator to be sent to prison in burglary cases is reduced by 18 per cent when he is remorseful.<sup>19</sup> In sum, remorse seems to provide a 'right to a discount' that is routinely granted.

The theoretical justification of this 'right to a discount' poses difficulties, though. The issue is much less trivial than it might seem at first sight. A standard justification is that the remorseful perpetrator has a self-transformative capacity.<sup>20</sup> One can say that he is able to correct himself and, therefore, deserves a milder sentence. The argument is vulnerable to the criticism, however, that there is no clear empirical evidence to support a correlation between remorse and decreased recidivism.<sup>21</sup> The second justification is that remorse is a moral good of its own and, therefore, worthy of civic recognition. Most people would say that a remorseful person has a better character than a wrongdoer who is not repentant.<sup>22</sup> But is such a character really better? Does remorse not show that the perpetrators would have had the emotional capacity to act differently? As established as the 'right to a discount' may be in practice, the theoretical justification is by no means watertight. To date, no empirical study exists that has been able to settle the debate. If we additionally take into account that there might be relevant criminological particularities of remorse and apology in the context of macro crimes, then the 'unreflected' import of domestic practices into international criminal proceedings appears as an undertaking on insecure ground. This notwithstanding the tenet of remorse was adopted along with the hopes — the conscious and the unconscious ones — connected to it. Before challenging the way the transfer was made, I will discuss two reasons for the optimism with respect to the adoption.

### **B. Hope to Exploit the Potential to Reconnect**

We instinctively associate the topics of remorse and apology with reconciliation. The link is deeply rooted in our socialization and everyday experiences. One of the first childhood lessons about dispute resolution is importance of apologizing.<sup>23</sup> Not learning it unavoidably leads to constant social problems and, eventually, not unlikely to isolation. Another early lesson concerns remorse. We learn

18 *Riggins v. Nevada* 504 U.S. 127, 144 (Justice Kennedy concurring).

19 Sentencing Council, *supra* note 15, at 29.

20 For the debate, see R. Zhong et al., 'So You're Sorry? The Role of Remorse in Criminal Law', 42 *The Journal of the Academy of Psychiatry and the Law* (J Acad Psychiat L) (2014) 39–48, at 40.

21 *Ibid.*, at 40.

22 J.G. Murphy, 'Remorse, Apology, and Mercy', 4 *Ohio State Journal of Criminal Law* (2007) 423–449, at 438.

23 S.B. Goldberg, F.E.A. Sander and N.H. Rogers, *Dispute Resolution: Negotiation, Mediation, and other Processes* (3rd edn., Aspen Publishers, 1999), at 159–160.

that remorse is expected when we have committed a wrong that cannot be regarded as harmless, when an 'I am sorry' is not enough and a visible emotional reaction by the wrongdoer appears necessary. The phenomena apology and remorse need to be understood in some depth if we want to understand the connections between international criminal justice and its role in reconciliation processes — and the gap between our expectations and reality. For reasons that will become clear later, I will begin with some remarks on remorse.

Remorse is a moral emotion which is in principle familiar to everyone. Laypeople and judges routinely refer to it when they judge other people, and most of us think that they recognize it, when they see it.<sup>24</sup> Theoretically, however, things are difficult. In psychological and psychiatric literature, remorse is described as a poorly formulated concept, lacking clarity and uniformity in both its definition and the definition of characteristics that show its presence or absence.<sup>25</sup> Tellingly, the most important standard manual for the classification of mental disorders, the 'DSM-5', edited by the American Psychiatric Association, only mentions 'remorse' once.<sup>26</sup> Nevertheless, for the present purpose, it seems clear enough, and we need it to understand the hopes put on international criminal tribunals. Simplifying things somewhat, one can say that remorse consists of a cognitive and an emotional component.<sup>27</sup> A remorseful offender recognizes and explains, with the appropriate degree of specificity, what he has done. He says, for example, that while he committed the crime on the victim, he regarded himself as more important and gave no thought to the health of the violated person.<sup>28</sup> The emotional component is more complex. It can be described as the painful combination of feelings of guilt and shame that arise in a person when he or she accepts responsibility for seriously wronging someone else.<sup>29</sup> There is a gravity threshold. Remorse for minor wrongs is not possible.<sup>30</sup> The crucial point is that the negative feelings are so strong that they force the perpetrator to correct his self-image. Remorse is more than feelings of guilt. It is primarily concerned with the other, while the focus of feelings of guilt is on the self.<sup>31</sup> Remorse typically manifests itself through signs and bodily symptoms, rather than through mere words.<sup>32</sup> It is a form of internal punishment, imposed by one's conscience

24 S.J. Morse, 'Commentary: Reflections on Remorse', 42 *J Acad Psychiat L* (2014) 49–55, at 55.

25 Zhong et al., *supra* note 20, at 39.

26 American Psychiatric Association (ed.), *Diagnostic and Statistical Manual of Mental Disorders* (5th edn., American Psychiatric Publishing, 2013) 659–663. The capacity to experience remorse is mentioned as a criterion to assess whether someone suffers from an antisocial personality disorder.

27 Morse, *supra* note 24, at 49.

28 Murphy, *supra* note 22, at 439.

29 J.G. Murphy, 'Well Excuse Me! Remorse, Apology, and Criminal Sentencing', 38 *Arizona State Law Journal* (2006) 371–386, at 377.

30 Murphy, *supra* note 22, at 430.

31 P. Gobodo-Madikizela, 'Remorse, Forgiveness, and Rehumanization: Stories from South Africa', 42 *Journal of Humanistic Psychology* (2002) 7–32, at 21.

32 R. Weisman, *Showing Remorse: Law and the Social Control of Emotion* (Ashgate Publishers, 2014), at 10.



that has internalized the social community norms. Remorse has a spontaneous character and cannot be planned.<sup>33</sup> Recognized as faked, it embarrasses. Sincere remorse, though, can have an amazing healing effect. Particularly face-to-face expressions of remorse may matter immensely to victims.<sup>34</sup> Research has shown that a substantial percentage of victims are highly interested in meeting with offenders.<sup>35</sup> Seeing the offender himself suffer may open up a road to reconnect. Remorse is painful, and as suffering from pain cannot be evil, there is always some 'good' in meetings between remorseful offenders and victims. The victim 'visits' the wounds of the perpetrator. Symbolically, the moral balance is restored, at least partly. The message of the crime — that the community norms do not apply to the wrongdoer and that he is superior to the victim — is modified. The key element for reconciliation is the attempt to appreciate the victim's pain. If, say, Ratko Mladić showed symptoms of suffering severely because of what he did and were prepared to endure face-to-face confrontations with victims, many would probably assume that this would have a strong effect on the reconciliation process in former Yugoslavia.

Apologies are to be distinguished from expressions of remorse. The two phenomena are related, though. Generally speaking, an apology is a spoken act that responds to a compelling social call about something that can neither be forgotten nor forsaken.<sup>36</sup> Erving Goffman — a sociologist who analysed symbolic aspects of human interaction — defined apologetic behaviour as part of the remedial work, which serves the function of repairing relationships after injury.<sup>37</sup> Form and content of an apology must be related to the gravity and the circumstances of the wrong. For small wrongs, the formula 'I apologize' typically is adequate and sufficient. The apologizer confirms that he respects the community norm and promises to continue doing so in the future. The apology corroborates the community norm and has the function of keeping the 'wheels of civility' oiled.<sup>38</sup> In minor cases, the apology tells us nothing about the mental state of the wrongdoer. The apology remains an entirely external and formal act.<sup>39</sup> If I bump into someone and say 'I apologize', no further steps are necessary, besides possibly a smile. The apology becomes more complicated, when the wrong can no longer be regarded as harmless.<sup>40</sup> The requirements become higher and when the apology is perceived as inadequate with respect to form, time or content, it turns into a provocation.<sup>41</sup> A mere

33 *Ibid.*, at 11.

34 Bibas and Bierschbach, *supra* note 17, at 116.

35 *Ibid.*

36 N. Tavuchis, *Mea Culpa. A Sociology of Apology and Reconciliation* (Stanford University Press, 1991), at 34.

37 E. Goffman, *Relations in Public: Micro-Studies of the Public Order* (Basic Books, 1971), at 109, 113–114; Jenkins, *supra* note 8, at 57.

38 Murphy, *supra* note 22, at 433.

39 *Ibid.*, at 447.

40 Generally on the issues and traps of apology, see N. Smith, 'Just Apologies: An Overview of the Philosophical Issues', 13 *Pepperdine Dispute Resolution Law Journal* (2013) 35–65.

41 See for more details, A. Lazare, *On Apology* (Oxford University Press, 2004), at 77.



'I am sorry' is perceived as inappropriate, for example, if someone has presented himself as needy to his friends, while in fact being quite affluent, or if someone has cheated on another person in a serious manner. The apology must contain a 'material' connection to the wrong, and the appropriateness depends on a number of circumstances: on the gravity of the wrong, the violated good, the relationship between the involved persons etc.<sup>42</sup> In some cases, reference to the victim's feelings may be necessary, in others a precise account of the facts may be enough. In very grave cases, it may be necessary to make the moral principle and the values at stake explicit. In such cases the line between appropriate and counter-productive apologies is thin. There are many traps. The offender should, for example, not conflate several harms to one general and unspecific harm, and he should identify the wrongs with the appropriate degree of specificity and be aware that generalities easily provoke.<sup>43</sup> Subtleties matter. Awareness of them shows the victim that the offender no longer regards himself as superior. Rape victims do not want to hear generalities on rape as true as they may be. Their concern is the specific rape that was committed on them, their specific pain. Parents of war victims are not interested in hearing what may happen when a civil war escalates. They want to know about the circumstances that led to their immense loss. Formulating an appropriate apology for international crimes, accordingly, is a most delicate issue. In some cases, giving a precise account of the facts and accepting responsibility may be sufficient. In others, remorse and repentance may be necessary. In the latter cases, remorse and apology have an overlap.<sup>44</sup> In sum, if circumstances are favourable, expressions of sincere remorse and adequate apologies in principle have the potential to improve relations between perpetrators and victims enormously — and thus, to promote reconciliation. The likelihood of this to happen in the context of macro crimes, however, will be discussed later on.

### C. Support by the 'New Culture of Apology'

Western societies have become significantly friendlier towards remorse and apology over the last decades.<sup>45</sup> This development — sometimes described as the rise of the 'new culture of apology' — seems likely to also have lowered the threshold for apologizing and expressing remorse in international criminal proceedings, at least to some extent. It is worth mentioning in this context that traditionally, generally speaking, both remorse and apology were regarded

42 On the modes of apology, see Tavuchis, *supra* note 36, at 45–117.

43 N. Smith, 'The Penitent and the Penitentiary: Questions Regarding Apologies in Criminal Law', 2 *Criminal Justice Ethics* (2008) 82–85, at 82.

44 Murphy, *supra* note 22, at 447–448.

45 The term 'age of apology' is younger than the phenomenon and was coined by R.L. Brooks. See R.L. Brooks, 'The Age of Apology', in *idem*, *When Sorry Isn't Enough: The Controversies over Apologies and Reparations for Human Injustice* (New York University Press, 1999) 3–12, at 3.

mainly as signs of weakness.<sup>46</sup> They were mostly treated as dishonourable and regarded as incompatible with the formalities of public life. According to an old Greek proverb, pointing out the essence of the traditional perception, honour was lost when 'I'm sorry' was invented.<sup>47</sup> As complex as the issue certainly is in the details, for our purpose it is important to note that politicians traditionally did not apologize.

Things have changed remarkably in this respect. The 'new culture of apology' has recoded apology and at the same time remorse, which are now seen more as signs of strength, showing that one has the confidence to admit one's mistakes instead of denying them.<sup>48</sup> Generally speaking, standards of private ethics — where apology was always indispensable, at least to some extent — have diffused into the public sphere. They have promoted a perception of social relations in which an apology no longer has the ring of surrender. From a cultural history perspective, the change can be interpreted as the mobilization of a specific Christian heritage.<sup>49</sup> In Christianity, humans are by definition sinners, and sin and apology belong together.

The recoding of apology and remorse has opened up roads to easier reconciliation. Humans are shown a way out of heroic stereotypes, of endless cycles of accusation and counter-accusation, victims are no longer expected to forget.<sup>50</sup> Some Western societies have become particularly friendly towards apologies, some are even said to be almost obsessed with them.<sup>51</sup> Whether or how far this primarily Western phenomenon has the power to transcend cultures and facilitate public expressions of remorse in non-Western societies is a question the complexity of which goes beyond the scope of this article. In principle, though, we may carefully maintain that the rise of the 'new culture of apology' seems to be good news for the case of international criminal tribunals and reconciliation.

### 3. Critical Reflections

#### A. *Fakery and Epistemic Limits of Tribunals*

The problem of fakery and epistemic limits of tribunals is of particular importance for our topic. My first critical reflection concerns the way remorse and apology are dealt with in everyday practice of international criminal tribunals. A critical analysis has to depart from the insight that deception is not an

46 This, of course, does not exclude that there were famous cases of remorse and apology. See e.g. Sophokles, *Antigone*, 1271–1272 (Kreon wailing).

47 See N. Mills, 'The New Culture of Apology', 4 *Dissent* (2001) 113–116, at 115.

48 *Ibid.*, at 113.

49 H. Lübke, "Ich entschuldige mich". *Das neue politische Bussritual* (Siedler Verlag, 2001), at 23, 42.

50 Mills, *supra* note 47, at 116.

51 See T. Judt, 'A Sorry State', *The Washington Post*, 9 May 2004; Lübke, *supra* note 49, at 35, 38.

exceptional human behaviour, but a common aspect of human interaction.<sup>52</sup> Another key fact to be taken into account is that routinely granted discounts for remorse create strong incentives to deceive. If the stakes are high, which is by definition the case in the context of macro crimes, fakery is all but unlikely to appear. The difficulty is that, generally speaking, tribunals can identify the emotional component of remorse — the described feelings of guilt and shame — only indirectly through circumstantial evidence or reliance on declarations of the accused.<sup>53</sup> The *Plavšić* case, which was mentioned in the introduction, is paradigmatic. It shows what can happen when the tribunal's wish to see remorse becomes stronger than its commitment to investigate the truth. Biljana Plavšić, formerly professor of biology, was a leading Bosnian Serb political figure from 1990 until the end of the war. In her capacity as Co-President of the Serb leadership, she was involved in the persecutions of Bosnian Muslim, Bosnian Croat and other non-Serb populations. On trial, she pleaded guilty and released a statement supporting her plea in which she expressed her remorse.<sup>54</sup> This was praised by the ICTY as an 'unprecedented' contribution to the establishment of the truth and a 'significant effort toward the advancement of reconciliation' — and widely celebrated.<sup>55</sup> After a while, though, after she had received a mild judgment of 11 years and spent some time in prison, she retracted.<sup>56</sup> She said in an interview that she had only pleaded guilty because she had been unable to gather enough witnesses to testify on her behalf, thereby not only recanting her guilty plea but also her statement of remorse. Later she even explicitly stated she still felt she had done nothing wrong.<sup>57</sup> And yet it was precisely her guilty plea that had prompted the court to drop the charge of genocide against her.<sup>58</sup> Many victims, but not the judges, had already recognized the fakery at the moment Mrs Plavšić made the statement.<sup>59</sup> The tribunal, though, not only rewarded it by considering it a mitigating factor, but in addition interpreted her plea of guilty as an additional sign of remorse.<sup>60</sup>

52 L. ten Brinke, S. Macdonald and B. O'Connor, 'Crocodile Tears: Facial, Verbal, and Body Language Behaviours Associated with Genuine and Fabricated Remorse', 36 *Law and Human Behavior* (2012) 51–59, at 51.

53 Tieger, *supra* note 12, at 778.

54 ICTY Press Release, 'Statement on Behalf of Biljana Plavšić/ Statement by Robert Pavich, Lead Counsel for Biljana Plavšić' (PIS/697e), 2 October 2002, available online at <http://www.icty.org/en/press/statement-behalf-biljana-plavsic-statement-robert-pavich-lead-counsel-biljana-plavsic> (visited 1 June 2016).

55 Sentencing Judgment, *Plavšić* (IT-00-39&40/1-S), Trial Chamber, 27 February 2003, § 67.

56 J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at the Hague', 36 *Southeastern Europe* (2012) 39–51, at 48.

57 Interview in English with the Swedish newspaper *Vi Magazine*, January 2009, available online at <http://www.thelocal.se/17162/20090126> (visited 1 June 2016).

58 *Plavšić* (IT-00-39 & 40-PT), Plea Agreement, 30 September 2002, § 3, available online at <http://www.icty.org/x/cases/plavsic/custom4/en/020930plea.en.pdf>.

59 Subotić, *supra* note 56, at 46.

60 Sentencing Judgment, *supra* note 55, § 73.

Distinguishing sincere remorse from faked, for sure, is a demanding task. Courts are not in a particularly good position to fulfil it as judges only see bits and pieces of the defendant, and this in a highly formalized environment. The likelihood of deception is substantial. A study by the Yale School of Medicine Department of Psychology provides important insights into the problems judges face when they are confronted with questions concerning remorse. They often disagree widely with regard to relevant indicators.<sup>61</sup> Some regard silence, for example, as a clear indication of remorselessness. Others treat it as a sign of shyness, fear or poor public speaking skills. In principle, though, it can also result from a conscious decision to not even try to show remorse because the evidence available to the prosecution is so damaging to any claim of remorse that an attempt to express it would only invite a devastating rejection.<sup>62</sup> Similar ambiguities exist with respect to putting one's head down or making eye contact. For some judges, putting one's head down is a sign of respect, while others see it as an indication of remorselessness.<sup>63</sup> Eye contact can result from the willingness to face the truth, but also be part of an attempt to be a particularly convincing liar.<sup>64</sup> The epistemic problem is further complicated, of course, if the allegedly remorseful perpetrator suffers from a psychiatric illness.<sup>65</sup> Interestingly, however, research nevertheless has found some relatively reliable clues. Falsified descriptions of remorseful feelings, for example, are generally accompanied by a greater range of emotions than genuine ones.<sup>66</sup> People who fake remorse, often leak positive feelings such as happiness or relief through the lower face. The more emotions are shown, the higher the likelihood that remorse is faked. A quite reliable clue also seems to be whether someone displays feelings of anger.<sup>67</sup> Anger and regret seem to exclude each other. A further indicator is the speed of transitions between positive and negative emotions. Genuinely remorseful persons rarely display immediate transitions between positive and negative emotions; there is almost always a return to a neutral 'baseline'.<sup>68</sup> Notwithstanding these clues, the difficulty of recognizing sincere remorse in practice can hardly be overestimated.

How do international criminal tribunals master the task? I shall answer the question by examining the practice of the ad hoc tribunals.<sup>69</sup> Both the ICTY and the ICTR have the legal leeway to take remorse into account in their sentencing<sup>70</sup> and have decided a high number of cases so that statistical figures

61 Zhong et al., *supra* note 20, at 43.

62 Weisman, *supra* note 32, at 62.

63 Zhong et al., *supra* note 20, at 43.

64 ten Brinke, Macdonald and O'Connor, *supra* note 52, at 53.

65 Zhong et al., *supra* note 20, at 39.

66 ten Brinke, Macdonald and O'Connor, *supra* note 52, at 57.

67 *Ibid.*, at 57.

68 *Ibid.*

69 To date, the International Criminal Court (ICC) has only had to deal with remorse in one case at the trial stage and in two cases at early release proceedings. A meaningful analysis of its practice is, therefore, not yet possible.

70 Art. 24(2) ICTYSt. and Art. 23(2) ICTRSt. provide that the 'circumstances of the convicted person' should be taken into account.

are significant. The ICTY, to begin with, states in its steady case law that expressions of remorse can be treated as a mitigating factor if they are 'real' and 'sincere'.<sup>71</sup> By setting such a standard, it commissions itself with a thorough assessment of whether these criteria are met. The reality looks different. The tribunal is extremely generous in accepting statements of remorse as sincere, particularly when a guilty plea is entered at the same time. No less than 31 out of 81 persons convicted until 20 June 2016 made statements of remorse.<sup>72</sup> The court only deemed four of these not sincere.<sup>73</sup> A serious examination and justification of the denial can be found in exactly one judgment, the one concerning Esad Landžo.<sup>74</sup> The most extreme example of the court's more than generous practice is the case of Dragoljub Kunarac. In this instance, the ICTY almost emptied remorse of any substantive requirements. Kunarac was a leader of a unit of the Bosnian Serb Army (VRS) and charged with crimes against humanity and violations of the laws or customs of war in form of torture, rape and enslavement. He neither pleaded guilty to all charges nor did he explicitly express any remorse during the trial. The court, however, interpreted his statement that he felt guilty about the fact that a woman was gang raped, while he was raping another person in an adjoining room, as a statement of remorse, and considered it a mitigating factor.<sup>75</sup>

The key problem is that the ICTY has developed a practice of gratifying guilty pleas by too easily recognizing them as a sign of sincere remorse. The threshold for accepting remorse as sincere especially in combination with a guilty plea has been lowered to a degree that one can hardly say that it still corresponds with the psychological concept of remorse. This does not mean that the court does not distinguish between guilty pleas and remorse at all. It does so, but in a rather remarkable way. The ICTY deems it possible for a perpetrator to repent without admitting to a crime, arguing that remorse can mean accepting some measure of moral blameworthiness for personal wrongdoing without accepting criminal responsibility or guilt for the whole indicted crime.<sup>76</sup> The tribunal has indeed judged accordingly with respect to six individuals.<sup>77</sup> The distinction can only be explained, in my view, by the wish of the ICTY to avoid a high threshold for remorse in order to keep it an effective incentive for cooperation. The consequence of this practice is that the court does not engage in a serious enough assessment of the sincerity of the remorse. Analysis shows that every time a defendant expressed remorse and also

71 See e.g. Judgment, *Mrkšić et al.* (IT-95-13/1-T), Trial Chamber II, 27 September 2007, § 700 (with further references).

72 For the number of sentences, see the infographic 'Facts and Figures', available online at [www.icty.org/en/content/infographic-icty-facts-figures](http://www.icty.org/en/content/infographic-icty-facts-figures) (visited 1 June 2016).

73 The number of individuals whose expressions of remorse were accepted as sincere or rejected was established by my research team.

74 Judgment, *Mucić et al.* (IT-96-21-T), Trial Chamber, 16 November 1998, § 1279.

75 Judgment, *Kunarac et al.* (IT-96-23-T & IT-96-23/1-T), Trial Chamber, 22 February 2001, § 869.

76 See Judgment, *Strugar* (IT-01-42-A), Appeals Chamber, 17 July 2008, § 365.

77 The six judgments are: *Kunarac et al. (Kunarac)* (IT-96-23 & 23/1); *Simić et al. (Tadić and Zarić)* (IT-95-9); *Blaškić* (IT-95-14); ICTY, *Brđanin* (IT-99-36); *Strugar* (IT-01-42).

pleaded guilty, the remorse was qualified as sincere. The four times sincerity was denied there was no concurrent plea of guilty.<sup>78</sup> In the *Plavšić* case, the ICTY laconically stated that by pleading guilty the defendant had already displayed remorse.<sup>79</sup> This practice of directly inferring sincerity of remorse from pleas of guilty benefits both the tribunal and the perpetrators, but not the victims. The tribunal is tempted to reward guilty pleas by treating them as sincere remorse, as this may allow it to get to the heart of the crime more quickly which increases the efficiency of the trials. More convictions become possible. Perpetrators get the 'discount' of sincere remorse in return for accepting some guilt which typically is a good deal for them. A serious assessment of remorse only takes place exceptionally. This can be seen as a capitulation to the epistemic and the efficiency problem. It deserves mention that in the early phase of the ICTY, guilty pleas did not play a role. When more and more defendants came into the tribunal's custody, though, things started to change. The ICTY became aware of how lengthy, costly and complicated international criminal proceedings are.<sup>80</sup> Both prosecutors and judges realized that full-scale proceedings on the expanded docket were extremely time-consuming. Given the temporal limits imposed on the forum's activity,<sup>81</sup> efficiency considerations took over the steering wheel.

At the ICTR, the picture looks similar. The tribunal also employs the main ICTY criterion of 'sincere remorse'<sup>82</sup> and practices 'guilty plea gratification deals' as described. Nine of 61 individuals convicted until 20 June 2016 expressed remorse.<sup>83</sup> Only in one instance, it was not accepted as a mitigating factor.<sup>84</sup> This was the only conviction of an allegedly remorseful person in which no plea of guilty existed. The court did not assess the sincerity of the remorse, though, but sweepingly denied that an expression of remorse existed at all. It follows that the ICTR, to date, has not in one single case rejected an expression of remorse due to its lack of sincerity. Generally, the number of allegedly remorseful individuals at the ICTR is lower in comparison with the ICTY, but the ratio of accepted remorse is higher. In sum, one could say that

78 The four judgments are: *Mucić et al. (Landžo)* (IT-96-21); *Vasiljević* (IT-98-32); *Lukić (Milan) & Lukić (Sredoje)* (*Lukić, Sredoje*) (IT-98-32/1); *Mrkšić et al. (Mrkšić)* (IT-95-13/1).

79 Sentencing Judgment, *supra* note 55, § 73.

80 M.R. Damaška, 'Negotiated Justice in International Criminal Courts', 2 *JICJ* (2004) 1018–1039, at 1035. For thoughtful remarks by Antonio Cassese on the problem, see H.V. Stuart and M. Simons, *The Prosecutor and the Judge. Benjamin Ferencz and Antonio Cassese. Interviews and Writings* (Pallas Publications, 2009), at 86–89.

81 Damaška, *supra* note 80, at 1035.

82 See e.g. Judgment and Sentence, *Serugendo* (ICTR-2005-84-I), Trial Chamber I, 12 June 2006, § 63 (with further references).

83 For the number of sentences, see the 'The ICTR in brief', available online at <http://www.unict.org/en/tribunal> (visited 1 June 2016). The number of individuals who expressed remorse was established by my research team.

84 Judgment and Sentence, *Nchamihigo* (ICTR-01-63-T), Trial Chamber III, 12 November 2008, § 392. The number of individuals whose expressions of remorse were accepted as sincere or rejected was established by my research team.



the Trial and Appeals Chambers of both the ICTY and the ICTR have developed a practice that essentially avoids critical assessment of remorse.

This picture is confirmed by an analysis of early release practice. I looked at the cases at the ICTY, the ICTR and the UN Mechanism for International Criminal Tribunals (MICT).<sup>85</sup> Again, efficiency prevails over the commitment to investigate the truth, generally speaking. The rules of procedure and evidence of the mentioned tribunals list four factors to be taken into account when decisions on early release are made: the gravity of the crimes, the treatment of similarly situated prisoners, the prisoner's demonstration of rehabilitation and any substantial cooperation with the prosecutor.<sup>86</sup> Remorse, in principle, is an aspect of the 'rehabilitation' criterion. In practice, though, the 'treatment of similarly situated prisoners' criterion has been applied in a way that it developed into a *de facto* presumption of unconditional early release after prisoners have served two-thirds of their sentences, thereby practically overruling the other criteria.<sup>87</sup> There is not one ICTY, ICTR or MICT case to be found, in which an applicant had served two-thirds of his sentence and early release was denied due to lack of remorse. The *Plavšić* case needs to be cited again. It shows an ICTY that acted wilfully deaf. *Plavšić's* early release hearing took place *after* she had publicly recanted her remorse statement and guilty plea. The President of the ICTY, however, did not even touch upon her recantation and undeviatingly continued to regard her guilty plea to constitute remorse.<sup>88</sup>

The described practices concerning guilty pleas and early release reveal a remarkable gap between the tribunals' daily work and the initially mentioned 'background purpose' — to contribute to reconciliation. The tribunals have created incentives to fake remorse and make strategic apologies. Reconciliation, though, is a child of sincerity and authenticity. It needs forgiveness,<sup>89</sup> and forgiveness and sincerity are close allies, even if sincerity of a perpetrator may be only a first step towards reconciliation.<sup>90</sup> Empirical research has found that victims of human rights abuses are indeed more forgiving when they believe a wrongdoer is truly sorry.<sup>91</sup> International criminal

85 The MICT has taken over all enforcement matters (including early release) from the ICTR (since July 2012) and the ICTY (since July 2013); see SC Res. 1966 (2010), Annex 1 Art. 1 and Annex 2 Art. 6; see also *supra* note 69.

86 Rule 125 ICTY RPE, Rule 126 ICTR RPE and Rule 151 MICT RPE.

87 J.H. Choi, 'Early Release in International Criminal Law', 123 *Yale LJ* (2014) 1784–1828, at 1788, 1795–1796.

88 Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs Biljana Plavšić, *Plavšić* (IT-00-39 & 40/I-ES), 14 September 2009, § 8.

89 W.J. Long and P. Brecke, *War and Reconciliation* (MIT Press, 2003), at 65; S. Freedman, 'Counseling, Forgiveness and Reconciliation: The Importance of Understanding How They Differ', 4 *Counseling and Values* (1998) 200–216, at 203–205 with further references.

90 G.J. Gold and B. Weiner, 'Remorse, Confession, Group Identity, and Expectancies', 22 *Basic and Applied Social Psychology* (2000) 291–300, at 291; L. Taft, 'Apology Subverted: The Commodification of Apology', 109 *Yale LJ* (2000) 1135–1160, at 1138.

91 A. Allan et al., 'Research Report: Exploration of the Association Between Apology and Forgiveness Amongst Victims of Human Rights Violations', 24 *Behavioral Sciences and the Law* (2006) 87–102, at 96.



tribunals, however, that display disinterest in the authenticity and sincerity of remorse and reduce them to mere speech acts with a bargaining value, contribute to gambling away the ground for reconciliation. In the eyes of victims, granting 'discounts' for recognizably faked remorse and strategic apologies is cynic. Are international criminal tribunals aware enough of how closely their legitimacy is linked to their commitment to the truth?

### **B. High-Ranking Defendants**

For the process of reconciliation, remorseful or apologizing political or military leaders would be particularly valuable. Public signs of remorse or a sincere 'I am sorry' of those who bear the main responsibility have a high symbolic value. In the imaginative universe, the collectivity of the perpetrators sends a sign to the collectivity of the victims that it is starting to face the truth about the crimes, the victims and themselves. The likelihood for this to happen in reality, however, is very low. At the Nuremberg Trials, of the 23 main defendants, only one, Albert Speer, accepted some guilt.<sup>92</sup> He did not express remorse properly, though, but only recognized his responsibility in very general terms.<sup>93</sup> Most defendants showed indignation and anger about being indicted, none of them seemed to suffer because of what they had done. At the ICTY, the situation is no different. Of the best known leading figures — Slobodan Milošević, Radovan Karadžić and Ratko Mladić — until the present day only Karadžić has shown — highly questionable — signs of slight remorse that will be discussed later on. No member of the top circle, though, has made an attempt to apologize. Milošević was — and Mladić still seems — untouched by what happened to the victims of the other conflict parties. Both were furious about being indicted and constantly accused or still accuse the tribunal. Milošević, who died during his trial, consistently pursued a strategy of blaming the tribunal as the aggressor, and presenting himself and the Serbian people as the victims.

Analysis of ICTY jurisprudence shows that sincere expressions of remorse among high ranks are very rare. Of 81 individuals convicted until 20 June 2016, four high-ranking figures made remorseful statements that were accepted as a mitigating factor. Two of them, Radovan Karadžić and Biljana Plavšić, were members of the top circle. The fakery of Plavšić's remorse has been discussed. In Radovan Karadžić's case — to be looked at in the next

92 Martin Bormann was included into the indictment, although he was absent and, as became known much later, already dead when the proceedings began. He is not counted here.

93 With some historical distance it has become clear how refined Speer's strategy at Nuremberg was where he appeared as the humble and reflective Nazi. He expressed repentance over dictatorship, but also said that he had planned a gas attack on Hitler, which was a blunt exaggeration of probably no more than a vague thought. Speer mainly spoke of the German people and did not refer to what the crimes meant for the victims. He condemned Hitler and his dictatorship, and warned the world of the dangers of future wars. There was neither an 'I am sorry' nor any precise account of his involvement in the crimes. Speer called his own fate unimportant in comparison to the events in general and the tasks to master in the future.

paragraph — the sincerity of his remorse does not withstand close examination. There is probably only one case of an unambiguously remorseful high-ranking perpetrator, the case of Milan Babić. It shows how shattering sincere remorse can be when a perpetrator of macro crimes fully realizes what he has been part of.<sup>94</sup> Babić was the President of the government of the self-declared Serbian Autonomous Region (SAO) Krajina between August 1991 and February 1992, and afterwards of the Republic of Serbian Krajina (RSK) in north-eastern Croatia. He promoted a campaign of persecution against non-Serbs, fomenting an uprising which enabled the Serb-dominated Yugoslav army to attack Croatia and later Bosnia. He did not belong to the highest circle of political and military leaders, but he was fully aware that his behaviour would lead to crimes such as mistreatment in prisons, deportations or forcible transfer. From the beginning of the trial, he accepted responsibility and pleaded guilty to all charges. The court regarded his statements as sincere and sentenced him to 13 years of imprisonment.<sup>95</sup> In 2006, Milan Babić committed suicide in his prison cell.

The most high-ranking perpetrator ever to be convicted by the ICTY, Radovan Karadžić, is of special interest for our purpose. His case illustrates how receiving a 'discount' for a statement of remorse has become the routine reward for the use of exactly tailored phrases. Karadžić was a founding member and President of the Serbian Democratic Party (SDS) until his resignation on 19 July 1996. He belonged to the three-member Presidency of Republika Srpska and thereafter sole President and supreme commander of its armed forces. The ICTY found Karadžić guilty of genocide in relation to the massacre in Srebrenica, where more than 7000 Bosnian men and boys were killed. It also found him responsible for crimes against humanity and war crimes including torture, rape and killing in detention of thousands, perpetrated with the intent to systematically remove the Bosnian Muslim and Bosnian Croat populations from territories claimed by Bosnian Serbs. His role in the siege of Sarajevo was deemed so instrumental that without his support it would not have occurred. Karadžić was sentenced to 40 years of imprisonment. A plea of not guilty was entered on his behalf. In a few instances, though, he expressed regret to a witness for the crimes the witness had suffered.<sup>96</sup> In his final brief, Karadžić stated: 'President Karadžić expresses his deep regret and sympathy to the victims of the crimes ... and to their families. *Regardless of the issue of his individual criminal responsibility for those crimes* (emphasis added) he understands that as President of Republika Srpska, he

94 The fourth high-ranking perpetrator whose expressions of remorse were accepted as sincere was Dragan Obrenović. Like Babić he was not a member of the top circle, but Obrenović was chief of staff and acting commander of a brigade of the Bosnian Serb Army (VRS). He was charged with crimes against humanity in the form of persecutions on political, racial and religious grounds. Originally unrepentant, he made a statement of remorse during his trial that was considered as sincere. Sentencing Judgment, *Obrenović* (IT-02-60/2-S), Trial Chamber I, Section A, 10 December 2003, § 120.

95 Sentencing Judgment, *Babić* (IT-03-72-S), Trial Chamber I, 29 June 2004, §§ 81–84, 102.

96 Judgment, *Karadžić* (IT-95-5/18-T), Trial Chamber, 24 March 2016, § 6059.

bears moral responsibility for any crimes committed by citizens and forces of Republika Srpska. He knows that any expression of regret or sympathy is inadequate to compensate for the suffering that took place during the war. Nevertheless, he offers his heartfelt expression of regret and sympathy ...<sup>97</sup> The ICTY first stated that sympathy for the victims does not amount to remorse as such – but nonetheless considered it as a mitigating factor.<sup>98</sup> It held that it had given due consideration to the expressions of regret in determining the appropriate sentence to be imposed.<sup>99</sup> An explicit assessment of the sincerity of Karadžić's remorse was not undertaken, and there is also no explicit statement declaring his statement a mitigating factor resulting in a reduction of his sentence; but that is exactly what the overall picture looks like. It is telling that Karadžić's final statement exactly mirrors the wording of the ICTY's case law concerning the possibility to express remorse without admitting criminal responsibility at the same time.<sup>100</sup> The statement sounds entirely calculated, especially when one considers that during his defence closing statement he also said: 'I really was a true friend to the Muslims. I know of no one in the Serb leadership who wanted to harm Muslims or Croats.'<sup>101</sup> Given the bluntness of the lie, it is simply impossible that Karadžić's statement of regret was more than a purely strategic move. Nevertheless, the court apparently gratified it.

The picture at the ICTR looks even worse. Of 61 individuals convicted until 20 June 2016, not one high-ranking defendant ever expressed sincere remorse. Defendants at the ICTR typically acknowledge that atrocities took place, but they consider them as excesses of legitimate and spontaneous defence efforts on behalf of the conflict party to which they belonged.<sup>102</sup> The case of Jean Kambanda is paradigmatic. Kambanda was the Prime Minister of Rwanda's interim government, following the death of President Juvenal Habyarimana, and the highest ranking former political leader in the ICTR's custody. He was accused and found guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and further crimes. Kambanda had publically encouraged killing, incited massacres, and congratulated people for having committed murders. On advice of his counsel Kambanda pleaded guilty — the first time ever that a head of state pleaded guilty to genocide. He appeared completely unrepentant, though, and did not express any remorse. When asked during his sentencing hearing, if he had anything to say, he stated that he had nothing further to add.<sup>103</sup> On request of the prosecution and the defence, the ICTR nonetheless discussed whether Kambanda's guilty plea was a sign of remorse. It eventually declined to interpret it in such a

97 *Ibid.*, § 6059.

98 *Ibid.*, § 6060.

99 *Ibid.*

100 See Judgment, *supra* note 76, §§ 365–366.

101 Defence Closing Statement, *Karadžić* (IT-95-5/18), Trial Chamber, 1 October 2014, at 47852, § 19.

102 N. Amoury Combs, 'Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentencing Discounts', 69 *Vanderbilt Law Review* (2006) 69–151, at 118.

103 See *ibid.*, at 108.

manner, though, and stated that it was mindful that remorse is not the only reasonable inference that can be drawn from a guilty plea,<sup>104</sup> and Kambanda was sentenced to life imprisonment. In his appeal, however, Kambanda challenged the validity of his guilty plea and argued that he had not been correctly informed by the ICTR that he would probably still receive a life sentence even if he pleaded guilty. The verdict was upheld. Kambanda's failure to show remorse and the resulting consequences he faced was a lesson to all who followed him.<sup>105</sup> All subsequent guilty-plea defendants expressed their remorse very carefully. Paul Bisengimana, for example, former bourgmestre of a commune near the capital Kigali, was initially indicted for, inter alia, genocide, extermination and rape as crimes against humanity. He only pleaded guilty to the charges of having aided and abetted in the commission of the crimes of murder and extermination, though. His expression of remorse was very carefully scripted. He only acknowledged the omissions that he had pleaded guilty to. At the pre-sentencing hearing, Bisengimana asked for pardon from the families that lost people in his commune and publicly expressed remorse, but only for not having been able to save those innocent people, which would have been his first duty.<sup>106</sup> The court accepted his remorse as a mitigating factor even though it obviously was not remorse in the proper sense. Bisengimana was convicted of extermination as a crime against humanity and sentenced to 15 years of imprisonment.

The few completed cases at the ICC do not alter the picture either. The only case addressing the issue of remorse of a high-ranking defendant is the one of Germain Katanga, a former leader of a Congolese rebel unit. During his trial, Katanga made a statement that was obviously just paying lip service. He just said that he felt compassion for the victims, and he described his feelings specifically with respect to the victims from his own community.<sup>107</sup> The ICC did not accept remorse as a mitigating factor in this case.<sup>108</sup> There are, in sum, just very rare cases of sincere remorse of high-ranking or even leading figures in the practice of international criminal tribunals.

Why? Given the gravity of the crimes and the social intelligence needed to climb up social hierarchies, even if they are pathological, one might rather expect the opposite, at least at first sight. The question is hardly touched upon in literature. The human inclination to label such perpetrators as 'butchers', 'monsters' or 'animals' – to create distance to them by way of dehumanization – is not helpful either. I will tackle the complex question in three steps.

The first step is — I follow the Bulgarian historian Tzvetan Todorov — to suggest to stop using the word 'human' as a compliment.<sup>109</sup> In the positive as in the negative, as a matter of fact, humans are capable of the most extreme. It is humans that are capable of committing macro crimes without

104 Judgment and Sentence, *Kambanda* (ICTR 97-23-S), 4 September 1998, § 52.

105 Amoury Combs, *supra* note 102, at 208.

106 Judgment, *Bisengimana* (ICTR-00-60-T), Trial Chamber II, 13 April 2006, § 137.

107 Decision on Sentence, *Katanga* (ICC-01/04-01/07-3484), Trial Chamber II, 23 May 2014, § 118.

108 *Ibid.*, § 121.

109 See T. Todorov, 'Memory as Remedy for Evil', 7 *JICJ* (2009) 447–462, at 453.

experiencing remorse,<sup>110</sup> and it is humans that find reasons for massacres they commit on members of the same species – not animals, so the comparison with animals is misleading anyway.<sup>111</sup> The problem must lie in some aspects of our common anthropological condition. Too many persons are involved in macro crimes that one could categorically call perpetrators mentally ill or sadistic. The overwhelming majority of the perpetrators seems to share our humanity and is induced to engage in the crimes by particular social, historical or psychological circumstances.<sup>112</sup> It deserves mention that the former prosecutor of the ICTY, Richard Goldstone, once estimated that about 200,000 people had committed crimes in the wars in Ex-Yugoslavia, but statistically only a small minority could have been mentally ill or sadistic.<sup>113</sup> In principle, most perpetrators were, therefore, average humans, as difficult as it may be to say so.<sup>114</sup> Macro crimes, generally speaking, mainly result from behaviour and reactions familiar to everyone that — under certain circumstances — have disastrous consequences.<sup>115</sup> All humans, as Antonio Cassese and many others say, share the traits of a certain aggressivity and destructiveness,<sup>116</sup> but most people manage to repress such impulses or to channel them towards peaceful and constructive action. Only in some cases, repression and channelling fails with terrible consequences. Adolf Eichmann, the organizational mastermind of the extermination of the Jews, is a dramatic example.<sup>117</sup> Hannah Arendt's description of Eichmann as a thoughtless bureaucrat is probably not appropriate — Bettina Stangneth has shown that his strong craving for personal recognition was his main driving force<sup>118</sup> — but Arendt's insight that average human characteristics play a key role remains valid. Eichmann pursued personal goals many people share — career advancement and personal recognition — with an attitude most people generally consider desirable: diligence with respect to details. Historical circumstances were such that this combination turned him into one of the greatest criminals of his time. Eichmann gradually became an obsessed fanatic, probably because the identification with his work increased over time.<sup>119</sup> This is typical for many people who search for recognition through their work. Eichmann was neither a sadist nor a psychopath in

110 See *ibid.*, at 453.

111 *Ibid.*

112 A. Cassese, 'Eichmann: Is Evil so Banal?', 7 *JICJ* (2009) 645–652, at 645.

113 Goldstone mentioned the number in a conversation with Antonio Cassese. See Stuart and Simons, *supra* note 80, at 53.

114 Arguing against any (psychological and social) reductionism: D. Kaminer and D.J. Stein, 'Sadistic Personality Disorders in Perpetrators of Human Rights Abuses: A South African Case Study', 15 *Journal of Personality Disorders* (2001) 475–486.

115 Todorov, *supra* note 109, at 447.

116 Cassese, *supra* note 112, at 645.

117 The 'eternal' question whether it is appropriate to address the deeds under heading of 'banality' is left aside here. See e.g. M. Ezra, 'The Eichmann Polemics: Hannah Arendt and Her Critics', 9 *Democratia* (2007) 141–165 (with references).

118 For a character revealing description of Eichmann's journey up the career ladder, see B. Stangneth, *Eichmann vor Jerusalem* (Rowohlt, 2014), at Chapter 1.

119 G. Bach, 'The Trial of Adolf Eichmann', 7 *JICJ* (2009) 647–652, at 649.

the psychiatric sense. But how, then, is it possible that he did not experience feelings of guilt and remorse afterwards?

The second step is to propose that the so-called theory of ‘neutralization’ of community norms explains, at least partly, the lack of the emotions we regard as expectable. Originally developed in the late 1950s to address ordinary juvenile criminality, the theory deals with the invalidation of general (social) community norms. It is of interest here as it links developments at the macro level of a group with subjective emotional reactions of its members to wrongs.<sup>120</sup> Juveniles often act in groups with their ‘own’ normative universe. Use of ‘neutralization techniques’ within the group can lead to the erosion of general social norms over time and foster criminality.<sup>121</sup> Five ‘neutralization techniques’ can be distinguished: denial of personal responsibility, denial of injury of others, denial of victims, condemnation of condemners and requirement of loyalty to higher ranked decision-makers. Jointly they help to create the group’s value system and identity. Claims about who belongs to the in-group and why, about the past, unjustly denied rights, heroic sacrifices and higher destinies etc., appear as self-evident to the group members.<sup>122</sup> An own group universe arises, whose imaginative or even spiritual dimension is strengthened by common sensual experiences, e.g. through wearing uniforms. The famous Stanford Prison Experiment,<sup>123</sup> a study of the psychological effects of becoming a prisoner or prison guard conducted at Stanford University in 1971, has shown, inter alia, how much costumes can reduce individuality and increase the identity of the group and the importance of its norms.<sup>124</sup> Groups grant increased anonymity and reduce the sense of responsibility, people tend to behave conform with their group norms — regardless whether they are pro- or antisocial.<sup>125</sup> De-individuation in a group with a strong identity does not mean an entire loss of the self, as simplifying theories claim, but a decreased focus on personal identity and, foremost, high responsiveness to group norms

120 See G.M. Sykes and D. Matza, ‘“Techniques” of Neutralization: A Theory of Delinquency’, 22 *American Sociological Review* (1957) 664–670.

121 S. Harrendorf, ‘How Can Criminology Contribute to an Explanation of International Crimes?’ 12 *JICJ* (2014) 231–252, at 249 (with references).

122 See e.g. A. Alvarez, ‘Destructive Beliefs: Genocide and the Role of Ideology’, in A. Smeulers and R. Haveman (eds), *Supranational Criminology: Towards a Criminology of International Crimes* (Intersentia, 2008) 213–231, at 216.

123 The aim of the study was to investigate how people react when randomly assigned the roles of guard or prisoner in a role-playing exercise simulating prison life. The participants adapted to their roles in an unexpectedly extreme manner. The guards enforced authoritarian measures and subjected some of the prisoners to psychological torture. The study was supposed to go on for two weeks. But the brutality of the guards and the suffering of the prisoners were so intense that after only six days the experiment was terminated. For a detailed description of the experiment, see P.G. Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (Random House, 2008).

124 C. Haney, C. Banks and P.G. Zimbardo, ‘Interpersonal Dynamics in a Simulated Prison’, 1 *International Journal of Criminology and Penology* (1973) 69–97.

125 See Harrendorf, *supra* note 121, at 243.



and group pressure.<sup>126</sup> Macro crimes are typically committed by formal or informal organizations that exercise pressure on their members and constantly confirm (or strengthen) their own symbolic universe by way of using 'neutralization techniques'. Such recoding of the group's morality transforms the normally criminal behaviour into *conform* conduct.<sup>127</sup> Macro crimes typically do not constitute deviant behaviour, ordinary crimes do. The ordinary criminal is punished for the violation of a group norm, when he is not able to conceal it,<sup>128</sup> but the macro criminal acts in accordance with the group code and may expect acceptance and in some instances even a reward. Constant use of 'neutralization techniques' helps to reduce cognitive dissonances between the group's code and normal community norms.<sup>129</sup> The perception of the criminal act as something wrong erodes over time and so does the capacity to experience feelings of guilt and shame — the emotional components of remorse. The theory of 'neutralization' mainly offers an explanation for how people who tend to behave conformly immunize themselves more and more against the moral bindingness of social community norms.

At this point, it seems necessary to introduce a distinction between two categories of high-ranking perpetrators: between highest and 'only' high-ranking offenders. The distinction is necessary as the theory of 'neutralization' has a lot to say about the behaviour and emotions of high ranks, but less about highest ranking perpetrators. This is the third step of my argument concerning the lack of remorse among members of the macro criminal elite. The top circle — particularly those who were already there in the early phase of the crime — is actively involved in the neutralization of the social community norms. Highest ranking perpetrators formulate and spread the ideology and demand allegiance from the rest, the top circle strategically normalizes hatred that initially may have been deviant and isolated. Their behaviour is, therefore, more deviant than conform. One may call this category of perpetrators with Mark A. Drumbl 'conflict entrepreneurs' to emphasize their role as ultimate decision-makers.<sup>130</sup> Lack of remorse at this level can hardly be explained by the theory of 'neutralization'. If I am right, this is the point where psychopathology comes back into play. What I have written on the 'normality' of perpetrators of macro crimes *in general*, hardly applies to this particular category of offenders. Reviews of psychiatric classifications of conflict entrepreneurs seem to show a high likelihood of a pathological psyche. Hitler, Milošević, Karadžić and Mladić, to mention a few of the best known, all showed signs of a pathological

126 See *ibid.*, at 243 (with reference to concepts developed by 'social identity theory').

127 See H. Jäger, *Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt* (Suhrkamp, 1989), at 12; for an in-depth analysis of conformity and deviance in perpetrators of macro crime, see Drumbl, *supra* note 9, 227–255.

128 D. Downes and P. Rock, *Understanding Deviance* (3rd edn., Oxford University Press, 1998), at 26–27.

129 See Harrendorf, *supra* note 121, at 249.

130 Drumbl, *supra* note 9, at 25.



psyche, the findings ranging from narcissistic over malignant narcissistic to psychopathical personalities.<sup>131</sup> The trait all these personality disorders have in common is the missing or highly reduced ability to feel remorse.<sup>132</sup>

We, therefore, have two explanations for lacking remorse among members of the elite in this roughly sketched model. There is the neutralization of community norms that plays a key role with respect to conformist high ranks, and there is the psychopathical personality that seems to be the main explanation with respect to conflict entrepreneurs. Evidence from early release cases provides some modest support for this view. Early release proceedings are interesting for our topic insofar as, at the time of the decision, perpetrators have already spent several years in a prison environment, which is hostile to the antisocial group norms according to which they had acted when they committed the crimes. With respect to conformist perpetrators, which are more likely to be found among high rather than highest ranks, a certain adjustment to the norms of the new environment and some instances of late remorse would not come as a surprise. In early release cases at the ICTY and the MICT (in cases concerning former Yugoslavia), eight applicants showed remorse for the first time at their early release hearing.<sup>133</sup> Some of them were high ranking, as for example, Dragoljub Ojdanić,<sup>134</sup> but none belonged to the top circle. Of the highest ranking perpetrators at the ICTY to date only Biljana Plavšić was yet eligible for early release; it has been discussed that her statement of remorse was coldly calculated.<sup>135</sup> In early release cases at the ICTR and the MICT (in cases concerning the conflict in Rwanda), only one applicant showed remorse for the first time at his early release hearing. He — Samuel Imanishimwe — was not a high-ranking offender, though. As regards the ICC, one of the two cases of early release proceedings is interesting for our purpose. It concerns Germain Katanga, a former leader of a Congolese rebel unit, who was unrepentant at the time of his conviction. He was a high-ranking offender but did not belong to the top circle. While serving his sentence, he started to show signs of sincere remorse. The ICC accepted his statement of

131 See i.e. A. Jones, *Genocide: A Comprehensive Introduction* (2nd edn., Routledge, 2011), at 385; R. Pettman, 'Psychopathology and World Affairs', 23 *Cambridge Review of International Affairs* (2010) 475–492, at 484; B. Glad, 'Why Tyrants Go Too Far: Malignant Narcissism and Absolute Power', 23 *Political Psychology* (2002) 1–37, at 3; K.B. Dekleva and J.M. Post, 'Genocide in Bosnia: The Case of Dr. Radovan Karadžić', 25 *Journal of the American Academy of Psychiatry and the Law* (1997) 485–496, at 491–492.

132 Psychopathy: R.D. Hare, G.S. Neumann and T.A. Widiger, 'Psychopathy', in T.A. Widiger (ed.), *The Oxford Handbook of Personality Disorders* (Oxford University Press, 2012) 78–504, at 479; malignant narcissism: M. Goldner-Vukov and L.J. Moore, 'Malignant Narcissism: from Fairy Tales to Harsh Reality', 22 *Psychiatria Danubina* (2010) 392–405, at 393; narcissism: O.F. Kernberg, 'The almost Untreatable Narcissistic Patient', 55 *Journal of the American Psychoanalytical Association* (2007) 503–539, at 505.

133 The number of applicants who showed remorse for the first time at their early release hearing was established by my research team.

134 Dragoljub Ojdanić was the Chief of the General Staff of the Yugoslav Army.

135 See Section 3.A of this article.

regret at his sentence review hearing.<sup>136</sup> It may, on the whole, be too early, though, to draw conclusions from these ICC cases.

The essence of this section can be summarized in two findings. First, to date, not one single case of a truly repentant perpetrator belonging to the top circle of conflict entrepreneurs exists. Plavšić and Speer, the names mainly associated with the topic, are in fact counter-examples. The typical attitude of highest ranks towards the indictment and punishment is defiance and anger. With respect to high ranks, the picture is more diverse. There are rare cases of repenting offenders of this category, but the threshold to express remorse remains high. The case of Milan Babić shows the existential abysses in a truly remorseful perpetrator of macro crimes. In sum, the seemingly scandalous remorselessness of political and military leaders at Nuremberg and before the ICTY and the ICTR, and in particular of Milošević, Mladić and arguably Karadžić, to mention only the best known offenders, is less surprising than at first sight. The likelihood of them displaying the symbolically so important deep dismay because of what they were part of is depressingly low.

### C. Overestimated Positive Effects

The last critical reflection concerns the assumed effects of sincere remorse and wholehearted apology where they exist at all. Also in this respect, things are much more complicated than in the context of ordinary crimes. It needs emphasis that remorse and apologies after atrocities always have many audiences: victims, perpetrators, supporters of victims, supporters of the perpetrators, the wider public etc.<sup>137</sup> They all have diverse needs and play a role in the reconciliation process. Their agendas often contradict each other. Some want the perpetrators to admit what they have done, others are dissatisfied with the degree of remorse or the moment of the apology. Some find that the perpetrators have the wrong kind of sorrow, which may be founded mainly in fear of the personal consequences, and others prefer the perpetrators to remain silent.

Even sincere remorse is perceived by some as an unbearable provocation. They find that publicly remorseful perpetrators get undue influence over the truth-telling process and unnecessary attention for their questionable morality. According to the South African writer Sandile Dikeni, the problem with public expressions of remorse after grave crimes is that it pushes the moral high ground back to the perpetrators.<sup>138</sup> The moral expectation to act, to contribute to reconciliation, may silently shift to the victims who feel pressured.<sup>139</sup>

136 See Sentence Review Hearing, *Katanga* (ICC-01/04-01/07-T-347), Appeals Chamber, 6 October 2015, at 33–34; Decision on the Review Concerning Reduction of Sentence, *Katanga* (ICC-01/04-01/07-3615), Appeals Chamber, 13 November 2015, § 50.

137 L. Payne, 'In Search for Remorse: Confessions by Perpetrators of Past State Violence', 11 *The Brown Journal of World Affairs* (2004) 115–126, at 121.

138 See M. Gevisser, 'Sandile Dikeni, Poet and Radio Broadcaster: A Voice of Truth and Dissent', *The Weekly Mail and Guardian*, 26 July 1996.

139 J.A. Corlett, 'Forgiveness, Apology, and Retributive Punishment', 43 *American Philosophical Quarterly* (2006) 25–42, at 30.

They may suffer from the hopes placed on them to accept the apology.<sup>140</sup> Even if it is 'objectively' clear that a victim of a grave crime is by no means morally obligated to forgive the offender,<sup>141</sup> the social reality of the victim may be entirely different. Forgiving after such crimes, though, is neither 'just normal' nor expectable. It is a most difficult step. It requires the victims to make a distinction between the immoral act and the immoral actor. They must forgive the one without tacitly approving of the other so that forgiveness can be squared with self-respect.<sup>142</sup> Not everybody is able to make the distinction. The negative feelings might be too strong. Some may even desperately wish to be able to forgive, but they cannot. Many victims react furiously to attempts to make them feel guilty for not being prepared or able to forgive. Given these diverse attitudes towards public remorse after macro crimes, the path from remorse to reconciliation appears as infinitely longer than in the context of ordinary crimes, not only because of the gravity. The view quoted at the beginning of this article that a complete and sincere apology by itself is capable of effecting reconciliation, seems detached from reality.

#### 4. Final Remark

I am still troubled with the topic of this article. Somehow, I continue to find it difficult to believe that remorse and appropriate apologies play such a poor role in trials on grave crimes. At the same time and against the background of what I wrote, it seems entirely logical to me. Also, I still find that remorse and apology after such crimes are a valid test of 'humanity' in a way. At the same time, and paradoxically, too, I see some truth in the argument that some offences are so evil that they go beyond the purview of remorse and apology.<sup>143</sup> I presume that many readers share my ambivalences. Intellectually and emotionally, the topic resists clear framing.

One thing I am sure about, though, is that we — at least in Western societies where I come from — intuitively put too much hope into remorse and apology in the context of macro crimes. We are influenced by the experiences in the micro sphere of our own lives and the role of remorse and apology in domestic criminal proceedings of our societies. We have heard countless media stories about remorseful offenders and magic reconciliations, and we have the strong wish that remorse and apology also play significant roles in international

140 J.L. Risen and T. Gilovich, 'Target and Observer Differences in the Acceptance of Questionable Apologies', 15 *Journal of Personality and Social Psychology* (2007) 418–433, at 419; M.K. Dhami, 'Effects of a Victim's Response to an Offender's Apology: When the Victim Becomes the Bad Guy', 46 *European Journal of Social Psychology* (2016) 110–123, at 111.

141 For a convincing philosophical argumentation, see Corlett, *supra* note 139, at 28–31.

142 H. Strang, 'Repairing the Harm: Victims and Restorative Justice', 15 *Utah Law Review* (2003) 15–42, at 23.

143 Speer himself recognized this problem in his memoirs. He wrote that no apologies are possible. See A. Speer, *Inside the Third Reich* (Phoenix, 2003), at 171. The problem has been labelled the 'paradox of remorse': see Murphy, *supra* note 22, at 426–427.

criminal proceedings. International criminal tribunals, it appears to me, act as if they were guided by the same thoughts and emotions. This may explain why they do not reflect on the particularities of remorse and apology in the context of macro crimes appropriately and import practices and beliefs from the domestic sphere, hardly giving a thought to the price for this transfer. They see remorse where there is none which may provide a short-term sense of security and console a little. It remains a perception, which is counterfactual, though. So why — I ask again — is so much hope put into remorse and apology?

It seems to me that a deep wish to avoid the void must play a key role. The insight that humans, who share our anthropology, are capable of committing grave crimes without experiencing remorse or having the slightest wish to apologize to the victims, is frightening. The topic probably touches upon a spiritual dimension of our existence. It challenges the way we perceive humans and how we make sense of the notion of humankind. Are we unconsciously led by the hope that nobody is definitely lost? Religious concepts may play a certain role in the background. All Abrahamic religions, for example, create a dichotomy around remorse and conceptualize it in the idea of the Last Judgment.<sup>144</sup> The believer and the repentant can expect redemption, while the unrepentant is sent to hell. International criminal tribunals can be regarded as courts of last resort of the secular world. If these final intuitions about the topic were true, we could at least say that the utopian hope in the power of remorse and apology also reflects one of the most noble characteristics of most humans: the capacity to empathize with others where reason would tell us not to.

144 See D. Leeming, *The Oxford Companion to World Mythology* (Oxford University Press, 2005), at 237; concerning Christianity: R. Leuze, *Das Christentum: Grundriss einer monotheistischen Religion* (Vandenhoeck & Ruprecht, 2011), at 187–188; concerning Islam: Hadhrat Mirza Masroor Ahmad, *Der Islam und die Freiheit des Gewissens* (Verlag der Islam, 2013), at 75–77; concerning Judaism: M. Tilly, *Das Judentum* (Marix, 2007), at 178.